United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: July 30, 2010

TO : Olivia Garcia, Acting Regional Director

Region 20

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: California Pacific Medical Center 530-6067-4060

Cases 20-CA-34859 and 20-CA-34906

This case was submitted for advice on whether the Employer violated Section 8(a)(1) and (2) by granting access to an incumbent union beyond those rights given in the parties' contractual access clause, while denying a rival union a similar right of access.

We conclude that the Employer was privileged to expand the incumbent union's right of access, where it did so in response to the union's request to bargain over increased access to carry out its representational duties, and there is no evidence that the Employer knowingly allowed access to the incumbent to campaign against the rival union.

The Employer, California Pacific Medical Center, has a contract with SEIU-UHW West covering employees at several hospital campuses in California. In January 2009, SEIU placed SEIU-UHW West under trusteeship. As the trustee, SEIU continued administering the terms of the extant contract, while negotiating a successor to the agreement that expired in June 2008. The expired agreement, as well as the recently negotiated contract, contain a clause giving the Union the right to meet with employees in "public areas within the Medical Center, such as cafeterias or coffee shops, or in designated non-work areas . . . at reasonable times for the purpose of observing whether this Agreement is being observed or to check on complaints of employees." The evidence established that the Employer had strictly enforced this provision by previously only allowing SEIU-UHW West representatives to meet with employees in the designated areas, despite the Union's aggressive attempts to meet with employees in other areas of the facilities.

In response to the imposition of the trusteeship, the newly-formed NUHW filed a representation and has been campaigning to represent the Employer's employees. For those reasons, NUHW has also sought access to the premises.

In August 2009, SEIU approached the Employer and asked that it be allowed to meet with employees in their break rooms and lounges so that the new representatives on behalf of the trustee could get to know the employees and meet with them regarding the contract negotiations. The Employer agreed to allow expanded access on a temporary basis and, on August 5, sent the following notice to its security guards:

Please be advised that SEIU-UHW reps (e.g. NOT NUHW) will be contacting Security starting tomorrow for temporary access to specific break rooms . . . for a period of sixty days from August 6 through October 2, 2009.

Consistent with this directive, SEIU representatives were allowed to meet with employees in the break rooms. NUHW representatives also witnessed SEIU representatives meeting with employees in Employer conference rooms and employee locker rooms, in which they had not previously been allowed.

The Employer did not allow NUHW representatives similar access to the facilities. On September 8, NUHW faxed a letter to the Employer notifying it that, over the recent months, "SEIU-UHW organizers have been given access to conference rooms, break rooms, the cafeteria and other public areas" of the medical campuses. NUHW further advised the Employer that, "as you are aware, a petition for representation is pending" at the regional office of the NLRB and "SEIU-UHW is utilizing their access for organizing campaign purposes." NUHW requested that the Employer give its representatives equal access; it did not receive a response.

There is no evidence that the Employer witnessed SEIU representatives campaigning in any of these areas.

We conclude that the Region should dismiss this allegation of these charges, absent withdrawal. The Employer was privileged to expand SEIU's right of access, where it did so in response to a legitimate bargaining request for increased access to carry out its representational duties, and there is no evidence that the Employer knowingly allowed SEIU to use that increased access to campaign against NUHW.

The Board has long held that employers generally must remain strictly neutral in representational campaigns among two or more unions, but has recognized that an incumbent union in such a situation may have an inherent advantage over a rival union where its contract with the employer or

past practice provides rights to access the employer's property and employees. 1 If there is a contractual access clause, the parties must continue to fulfill their bargaining obligations pursuant to the clause.² If a union access clause is worded broadly, we must interpret how the parties have construed and applied the clause in the past. If the parties' past practice limited a broad access clause to solely allow access for contract administration, then the union cannot rely on the clause for campaigning or other non-contract purposes. 3 It follows that, if the union historically relied on the clause only to gain access for contract administration, the employer must exercise care to not knowingly allow that union to abuse its access rights to campaign against a rival union. 4 If, however, the incumbent union has historically relied upon an access clause to access an employer's facility for campaigning, internal union meetings or other non-contract administration purposes, the employer has an obligation to continue to allow the union access to its facility. 5

It is undisputed that the parties here have maintained a "narrow" access clause that, by its terms, limited the range of SEIU's access to public areas within the medical center, and limited the purpose to contract administration or to check on employee complaints. It is also undisputed that, historically, the Employer has strictly enforced this provision, even in the face of SEIU's repeated attempts to meet with employees in other areas of the facilities.

Yet, it is also undisputed that SEIU approached the Employer to request access to additional areas for the purpose of getting to know the employees and also to meet with them regarding ongoing contract negotiations. Knowing that the SEIU representatives, as trustees of the local, were not as familiar with the unit employees and, recognizing its bargaining obligation with SEIU, the Employer agreed to the additional access on a temporary and circumscribed basis. In doing so, the Employer respected

¹ Laub Baking Co., 131 NLEB 869, 871 (1961).

West Lawrence Care Center, 308 NLRB 1011, 1012 (1992).

³ See <u>id.</u> at fn. 3 (parties' past practice can limit otherwise broad access clause).

⁴ See Laub Baking, 131 NLRB at 871.

⁵ See <u>West Lawrence Care Center</u>, 308 NLRB at 1012 (employer could not restrict union from accessing facility for organizational purposes where employer admitted that access clause allowed access for organizational purposes).

its obligation to meet and discuss with the representative of its employees, and the agreement it reached was valid.

The investigation did not uncover any evidence that suggests the Employer granted SEIU the additional access to campaign against NUHW, nor that it knowingly allowed SEIU to use its right of access for that purpose. NUHW sent the Employer a letter on September 8 clearly putting it on notice of its view that SEIU was using its access to campaign. However, the fact that the Employer had notice does not equate with evidence that, in any particular instance, it was aware that SEIU was campaigning and allowed it to continue. In the absence of any evidence that the Employer knowingly allowed SEIU to use its right of access in such a manner, we cannot say that its conduct violated Section 8(a)(1) and (2) of the Act.

The Region should therefore dismiss this allegation of these charges, absent withdrawal.